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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 167

NATIONAL BANK OF COMMERCE IN MEMPHIS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 90-94) is reported at 87 F. Supp. 302. The *per curiam* opinion of the Court of Appeals is reported at 180 F. 2d 350.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1950. (R. 109.) A petition for rehearing was denied on April 6, 1950. (R.

191.) The petition for a writ of certiorari was filed on June 30, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether the court below correctly affirmed the holding of the District Court that the 1937 transfer of the banking house and facilities of the Bank of Commerce & Trust Company to the taxpayer bank was neither in connection with a reorganization nor a statutory non-taxable exchange, with the result that the taxpayer bank is not entitled to depreciate the banking house and facilities on the same basis as such property had in the hands of the transferor.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The material portions of the findings of the District Court (R. 94-101) may be summarized as follows:

In January, 1933, the Bank of Commerce & Trust Company, a state institution, hereinafter called the old bank, was beset with difficulties growing out of the widespread general depression which threatened its existence and were aggravated by a run on the bank by its depositors. At that time and subsequently the old bank was solvent. It was doing business at 45 South Second Street, Memphis, Tennessee, and its assets included generally

its banking house and equipment, money, securities, notes, accounts receivable, stock of Memphis Abstract Company (afterwards changed to Commerce Title Guaranty Company), a subsidiary corporation, other stocks and bonds, other real estate, etc. (R. 94-95.)

In February, 1933, the so-called "bank holiday" having closed all banks, the question arose as to whether the old bank should reopen or whether the interests of all concerned would best be served by the organization of a new national bank. The stockholders and directors of the old bank sought and obtained financial assistance from the Reconstruction Finance Corporation to meet the emergency and the assets of the old bank were pledged to the R. F. C. as security for loans. The stockholders and directors of the old bank decided to liquidate it, and appoint a committee to liquidate its assets and to organize a new national bank to insure the payment of its depositors and protect its stockholders. (R. 95.)

On April 27 and 28, 1933, the directors and stockholders of the old bank respectively held formal meetings at which, among other things, action was authorized (a) to liquidate the assets of the old bank by a named liquidating committee and (b) to organize a new national bank. At these meetings there was some discussion of a rental arrangement between the old bank and the new bank regarding the bank building and equipment and mention was

made that "at this time it was not proposed that the new national bank take over the bank building." However, the matter was not acted upon by resolution or otherwise. So far as this record shows, no plan of reorganization is reflected by any action of the stockholders or directors of either the old bank or the new bank by corporate record prior to 1937 showing any intention or creating any obligation of the old bank to transfer its bank building and fixtures to the new bank or any record of any intention or obligation of the new bank to purchase such properties. (R. 95-96.)

Pursuant to the action of the stockholders and directors of the old bank a charter was obtained for the taxpayer corporation, National Bank of Commerce in Memphis (hereinafter called the new bank), and it was organized and opened for business on May 1, 1933, as a national bank. The authorized capital stock of the new bank has a book value of $2,000,000 all of which stock was subscribed and paid for in cash by the old bank (except the qualifying shares of the directors thereof). (R. 96.)

The $2,000,000 paid by the old bank to the new bank for its stock was borrowed by the old bank from the R. F. C. under an arrangement whereby the stock of the new bank was hypothecated as collateral to the R. F. C. to be held in a voting trust as a substitute for certain securities of the old bank covered by its mortgage to the R. F. C. which

securities in turn were released by the R. F. C. and transferred by the old bank to the new bank. The securities so released and transferred to the new bank were liquid securities acceptable under the national banking laws and money of the old bank in the amount and aggregate of the entire deposit liability of the old bank. The new bank assumed the deposit liabilities of the old bank. No other property of the old bank passed in the transaction at the time. (R. 97.)

The authorized capital stock of the new bank consisted of 10,000 shares of $100 par value. The capital structure at the date of organization was as follows (R. 97):

Capital stock	$1,000,000.00
Surplus	750,000.00
Surplus paid in	250,000.00
Total	$2,000,000.00

The old bank subscribed and paid for all of the stock except 140 qualifying shares, but it was contemplated that the trust accounts and trust duties of the old bank were to be worked into the new bank in so far as possible. After the transfer of the money and securities by the old bank to the new bank, the resources of the old bank remaining for liquidation amounted to more than $8,000,000 as of December 31, 1936, and it had capital and surplus at that time of $3,437,462. (R. 97-98.)

Among the assets of the old bank which it retained for liquidation were its bank building and equipment. When the organization of the new bank was completed in 1933, it leased from the old bank, at a rental of $30,000 per year, the use of the equipment and the space occupied by it in the bank building. This arrangement continued without essential change until the new bank purchased the bank building and equipment in 1937. (R. 98.)

During all times pertinent here the old bank and the new bank were managed and controlled by the same individuals, but from and after the organization of the new bank they were separate entities operating under different charters with different functions. (R. 98.)

Prior to 1937, negotiations had been carried on for some time between the old bank, the new bank and the R. F. C. looking toward the sale of the bank building and equipment of the old bank to the new bank and the release of these properties from the operation of the liens and claims of the R. F. C. At a meeting of the directors of the old bank on January 5, 1937, a formal resolution was adopted which, *inter alia,* considered the offer of the new bank to purchase the bank building and equipment for $950,000 cash; considered that the price offered was fair and reasonable; accepted the offer as made; and authorized the consummation of the sale by the proper officers of the bank. These officers

were also authorized to negotiate and contract with the new bank for the use of such space and equipment therein as was required by the old bank to conduct its business. On the same day the directors of the new bank by formal resolution approved the purchase of the bank building and equipment from the old bank and authorized its consummation at the price of $950,000 as the fair and reasonable value of the properties. The same resolution authorized negotiation of the rental to be paid by the old bank to the new bank for space and equipment in the bank building. (R. 98-99.)

Pursuant to the action of the board of directors of the old bank and the new bank on January 5, 1937, a warranty deed of conveyance dated January 8, 1937, was executed and delivered by the old bank to the new bank on January 9, 1937, transferring the bank building and equipment for the consideration of $950,000, which amount was paid by cashier's check of that date. The books of both the old bank and the new bank reflected the transaction as a sale and purchase. The old bank in its corporation income and excess profits tax return for 1937 claimed a loss on the sale amounting to $340,534.49. This loss was accepted by the Commissioner of Internal Revenue without change though the old bank received no tax benefit therefrom because all income for that year was absorbed by other losses. The new bank likewise in its re-

turns for the years 1937 through 1941 claimed and was allowed depreciation on the basis of $950,000 cost and fair value at time of acquisition of the bank building and fixtures and no claim for additional depreciation on a higher base was made by the new bank until after it had filed its return for 1941, when it made a claim therefor on the theory that the building and equipment were acquired in connection with a reorganization. (R. 99-100.)

The $950,000 received by the old bank from the sale was used to reduce its indebtedness to the R. F. C. The new bank has prospered. The old bank has paid off its indebtedness to the R. F. C. The old bank surrendered its charter on March 17, 1947, after distributing to its stockholders as liquidating dividends all the stock it ever owned in the new bank and 9,820 shares of the common stock of Commerce Title Guaranty Company worth in excess of $100 per share. The record is not clear as to other distributions, if any. (R. 100.)

An additional tax was assessed against the new bank because of the decrease in the basis of the banking house and facilities. (R. 2, 8-9.) A claim for refund for 1941 was filed on March 26, 1945. (R. 9.) The District Court held that the new bank was not entitled to a refund since it could not depreciate the bank building and equipment on the same basis as the property had in the hands of the transferor. (R. 101.) The Court of Appeals affirmed the holding of the lower court. (R. 109.)

ARGUMENT

This petition presents no questions warranting review by this Court. The case involves merely the application to the particular facts in this record of established legal principles. The decision below is clearly correct, and there is no conflict of decisions.

Whatever may have been the character of the basic 1933 transaction whereby the new bank took over the active business assets of the old bank, the plain fact is that it did not take over the banking house and facilities as part of that transaction. Rather, it leased them from the old bank at a rental of $30,000 a year, and it was not until 1937, as part of what the courts below found to be a wholly separate transaction, that it undertook to purchase the banking house and facilities for $950,000 cash. The sole question in the case is whether the new bank must depreciate these assets upon the basis of cost to it, namely, $950,000, or whether it may use a higher basis, namely, the basis that the assets had in the hands of the old bank. To succeed in its claim to use the higher basis, it contends that these assets were taken over in connection with a reorganization. But the determination of both courts below, amply sustained by the record, is that the purchase of the bank building and equipment was a wholly independent transaction. Indeed, the transaction was considered as a sale for cash at the time of its consummation and was so treated in the income tax returns of the old and new banks. (R. 99, 100.) There were no references to a plan of

reorganization until some nine or ten years later in the minutes of the meetings of the board of directors and stockholders of the Bank of Commerce & Trust Company held in 1946-1947. The 1937 minutes of both banks referred to the transaction as a sale and purchase. There was no requirement that the banking house and facilities be transferred to the new bank.[1]

Thus, there is not here presented on this record the question which petitioner seeks to raise (Pet. 9), whether a single step may be isolated from a series of steps constituting a completed transaction. On this record, the sale of the banking house and equipment was a wholly independent transaction.

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[1] Moreover, the consideration for the property transferred in 1937 was entirely cash; it was not an exchange either in whole or in part for securities in the new bank. Accordingly, it could not come within one of the non-recognition provisions of Section 112(b) of the Revenue Act of 1936. (Appendix, *infra*.)

CONCLUSION

The decision below is correct and turns upon the particular facts of the case; no conflict of decisions or question of importance is presented. It is respectfully submitted that the petition should be denied.

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AUGUST, 1950.

APPENDIX

Internal Revenue Code:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(7) *Transfers to corporation.*—If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by

the issuance of stock or securities of the transferee as the consideration in whole or in part of the transfer.

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition or property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * *

(26 U. S. C. 1946 ed., Sec. 113.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(i) *Definition of Reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitaliza-

tion, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a cor-

poration by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 577. *Definitions.*—The term "reorganization," as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

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